IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

MARK BARROW,
Respondent.
_____/

CASE NO.: SC10-529

L.T. CASE NO. 4D07-3420

RESPONDENT'S AMENDED ANSWER BRIEF ON THE MERITS

LEVINE & SUSANECK, P.A.
FREDRICK R. SUSANECK, ESQ.
DONNA P. LEVINE, ESQ.
Florida Bar Number 332763
324 Datura Street, Suite 145
West Palm Beach, Fl 33401
Phone (561) 820-8782
Fax (561) 820-8099
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES **PAGE(S)**

PRELIMINARY STATEMENT

Respondent accepts petitioner’s preliminary statement.

STATEMENT OF THE CASE AND FACTS

The Fourth District Court of Appeal reversed respondent, Mark Barrow's conviction for first degree murder, holding that "the trial judge abused his discretion by responding to the jury's question about the availability of transcripts in the negative, without advising the jury about the potential for read backs of witnesses' testimony, ignoring the request of both the state and defense. We also note that the trial judge's apparent adoption of an ad hoc rule prohibiting read backs amounted to a failure to exercise the discretion granted to trial judges in this area". Barrow, at 213. The Fourth District also certified conflict with the decision in Hazuri v. State, 23 So. 3d 857 (Fla. 3rd DCA 2009), which found that the trial court did not abuse his discretion in similar circumstances. The Fourth District believed that its opinion was more in harmony with Florida's view of the jury's role in a criminal case.

As was further highlighted by the opinion of the Fourth District, and as arose from the facts and evidence of this cause at the trial level, Respondent, Mark Barrow, was convicted of the first degree murder of Rae Michelle Tener, whose body was

never found. Barrow v. State, 27 So. 3d 211 (Fla. 4th DCA 2010); (r. 6). No witness observed the murder, nor did any of the witnesses testify that he or she observed any violence between respondent and Ms. Tener on the night she disappeared. Barrow, at 213.

The physical evidence against respondent consisted of three (3) spots of Ms. Tener's blood that were located within respondent's van. Id at 215. However, there was uncontroverted testimony that Ms. Tener had been inside respondent's van on previous occasions. The drops of blood were susceptible of an innocent explanation.

Ms. Tener had a history of disappearing for days at a time, leaving her young son alone. Id at 213. Hurricanes Frances, Jeanne, and Wilma came through town from the time of her disappearance, to the time of the investigation, and to the time of respondent's arrest, possibly causing some havoc in this cause.

Petitioner's main witness was Peggy La Salle, who lived with respondent but was not present at the party he hosted on the last night Ms. Tener was seen, as respondent had driven her earlier to a drug rehabilitation facility to cope with an overdose. Ms. La Salle, who testified that respondent had confessed to her that he had killed Ms. Tener, changed her story

many times throughout the course of the trial proceedings, up to and including while she testified (t. 511 et seq.). The details to which she testified were not independently corroborated. Her story was also inconsistent with the only physical evidence introduced in this cause. When confronted that her testimony conflicted with her earlier version of respondent's confession, she told the jury that she did not care, because the details did not matter. Id at 219. The Fourth District expressly found that she was not a strong witness. Id at 219.

Moreover, the manner of death which Ms. La Salle testified that respondent confessed to her he had committed upon Ms. Tener, was similar to the bases of a domestic violence complaint she had herself previously sworn against respondent. Id at 215. I.e., Ms. La Salle had earlier alleged that respondent had committed very similar acts upon her, such as throwing each of them out of the trailer and onto a rock. Barrow at 219. Other evidence in the trial however, cast doubt on Ms. La Salle's testimony. Barrow at 219.

Respondent had given recorded statements to the police, which were both played at trial. In them, he at all times maintained his innocence. N.B. Both the state and the defense had transcripts of these statements, as well as others, in their

possession at counsel table. Both the state and defense held these transcripts while they questioned various of the witnesses.

Respondent's various corpus delicti objections, as well as his objections to the sufficiency of the evidence and other objections were overruled throughout the course of the trial.

Within ten (10) minutes of the jury's retirement to deliberate, the jury sent out a question asking for transcripts of various witnesses' testimony. As soon as the trial judge let the parties know what the jury's question was, he then said:

> "First of all, there are no transcripts. I get that question in every trial. That's within the first ten minutes. So, my response to them is there are no questions.
>
> (t. 1243).

The State immediately responded:

> I think Mr. Susaneck and I, if you wanted to go on further than that, talk about saying that there are no transcripts that they can have, that they can, I don't know if you want to suggest that they can have read backs.
>
> (t. 1243).

Without even giving respondent a chance to speak, the trial court responded:

> No, I don't do read backs. Okay.
>
> (t. 1243).

The trial court next expressed:

> So, and, because Mr. Susaneck is giving me that Courthouse common law look, let me refresh his recollection.
>
> (t. 1243-1244).

The trial court then cited cases he had at hand regarding read backs. The trial court equated the earliness of the jury's question with impracticality, although they did not in fact ask to have the entire trial read back to them (t. 1245). He stated no other reason(s) for his decision, other than the above statement that he did not do read backs. The trial judge, in the same commentary as that described immediately hereinabove, stated:

> So, I am not going to put in there that they can ask for read backs. I am just going to write on there, that there are no transcripts, please rely on your recollection of the proceedings.
>
> (t. 1243).

Respondent asked the trial court to instruct the jury that they had a right to ask for a read back (t. 1246). The trial court maintained its stance. The trial court instead sent the jury a note that read:

> There are no transcripts available for your review. Please rely on the evidence presented during the proceedings.

Hours later, the jury found your respondent guilty of first degree murder.

On appeal, as previously mentioned, the Fourth District overturned Mr. Barrow's conviction, as it held that the trial court's abuse of his discretion was not harmless error. In its opinion, it found this to be a case that turned on its details. Barrow, supra, at 219. It also held that the state's main witness was not a strong witness. Id at 219. The Fourth District stated:

> Her testimony conflicted with her earlier version of Barrow's confession, and she told the jury that she did not care, because the details did not matter. She had multiple reasons to be angry with appellant. She had recanted an accusation that appellant had attacked her in exactly the same manner she said he confessed to attacking the victim - by throwing her out of the trailer on to a rock.

> The fact that Zack did not see any blood when he found the cherry cigars casts doubt on Peggy's testimony that appellant had killed the victim by smashing her head on a rock in the same general area where the cherry cigars were found.
>
> Id at 219.

The Fourth District held that it could not conclude that the trial court's error regarding the abuse of his judicial discretion was harmless error given the inability of the jury to more closely examine the conflicting evidence in this cause. It cited Roper with approval, which held that the trial court abused its discretion when the trial judge employed a semantic shell game effectively foreclosing the jury from the knowledge that there was a method to have testimony read to them. Roper v. State, 608 So. 2d 533 (Fla. 5th DCA 1992).

The Fourth District in its opinion certified its conflict with the Third District in Hazuri, Hazuri v. State, 23 So. 3d 857 (Fla. 3rd DCA 2009)(Cope, J., dissenting) and held that its decision, as in Volk, Volk v. State, 754 So. 2d 82 (Fla 4th DCA 2000) and in Avila, Avila v. State, 781 So. 2d 413 (Fla. 4th DCA 2001) was more in harmony with Florida's view of a jury's role in a criminal trial, that a jury should make a careful,

considered evaluation of detailed evidence. And furthermore, that the jury has the right to return to the courtroom at any time and ask questions that are calculated to shed light on the controversy or that will in any way assist it or the Court in developing the truth of the controversy. Sutton v. State, 51 So, 2d 725 (Fla. 1951); LaMonte v. State, 145 So. 2d 889 (Fla. 2nd DCA 1962).

From the decision of the Fourth District Court of Appeal, reversing Mr. Barrow's conviction for first degree murder in a case that was not strong, Barrow at 220, petitioner invoked the discretionary jurisdiction of this court. This court accepted jurisdiction, postponed a decision on oral argument, and ordered briefs on the merits. Respondent hereby answers petitioner's initial brief on the merits.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Fourth District Court of Appeal, which reversed respondent, Mark Barrow's conviction for first degree murder and should resolve the conflict with the Third District Court of Appeal in Hazuri v. State, 23 So. 2d 857 (Fla. 3rd DCA 2009) accordingly. The Fourth District Court of Appeal held that the trial court abused his discretion by responding to the jury's question about the availability of transcripts in the negative, without advising the jury about the potential for read backs of witnesses' testimony, ignoring the request of both the state and the defense. The Third District, in similar circumstances, found no error warranting reversal. Yet, part of the trial judge's role is to forthrightly make the jury aware of those tools available under the rules of criminal procedure that will assist the jury in arriving at its decision.

Respondent asserts that the Fourth District's decision is more in harmony with Florida's view of the jury's role in criminal cases. It better promotes our intention that jurors give their causes full consideration in undertaking their solemn responsibility.

Respondent also asserts that the certified conflict should be resolved in favor of Barrow as the trial judge announced that he had a rule - “I don’t do read backs”. The trial judge failed to exercise his discretion in an area where discretion is provided. The Fourth District’s opinion should be affirmed.

Also, there was insufficient proof of corpus delicti, also warranting the reversal.

And, last, respondent respectfully suggests that to overturn this decision would be to put expedience over justice.

ISSUE I
(RESTATED)

THE FOURTH DISTRICT'S REVERSAL OF RESPONDENT'S CONVICTION WAS PROPER WHERE THE TRIAL JUDGE ABUSED HIS DISCRETION, EFFECTIVELY NEGATING AN OPTION ALLOWED TO THE JURY IN ITS RESPONSIBILITY TO REACH A FULL AND CONSIDERED DECISION; THE CONFLICT CERTIFIED WITH THE THIRD DISTRICT IN HAZURI SHOULD BE RESOLVED IN FAVOR OF THIS FOURTH DISTRICT DECISION

This Court's discretionary jurisdiction grants it the power to resolve decisional conflicts in the body of the law.

The Fourth District Court of Appeal reversed respondent's conviction for first degree murder, holding that "the trial judge abused his discretion by responding to the jury's question about the availability of transcripts in the negative, without advising the jury about the potential for read backs of witnesses' testimony, ignoring the request of both the state and defense. We also note that the trial judge's apparent adoption of an ad hoc rule prohibiting read backs amounted to a failure to exercise the discretion granted to trial judges in this area". Barrow v. State, 27 So. 3d 211 (Fla. 4th DCA 2010).

This issue addresses only that portion of the Fourth District's decision referenced in the title of the issue. The second basis for the Fourth District's decision shall be addressed separately.

Respondent, Mark Barrow, had been convicted of first degree murder in a case fraught with inconsistent testimony, where the physical evidence was slight and susceptible of innocent explanation, and where there was no body. No witness observed a murder, nor indeed any violence between respondent and Rae Michelle Tener, the named victim, on the night she disappeared. Indeed, Ms. Tener had a history of disappearing for days at a time, leaving her young son alone.

Within ten (10) minutes of the jury's commencement of its deliberations, in this first degree murder trial with no lesser included offenses, the jury sent out a question, asking for transcripts of various witnesses' testimony (t. 1243); Barrow, 27 So. 3d at 213.

The trial judge immediately played semantics, or "niggling nitpicking" (see Hazuri v. State, 23 So. 3d 857, 861 (Fla. 3rd DCA 2009, Cope, J., dissenting opinion) with the jury's request, ignoring or overlooking the more wholistic situation that the jury was trying to do its job, in compliance with the very

considerations set out to it, and was making a serious and considered request of the trial court. Among the standard instructions given to the jury prior to commencing deliberations is the admonition:

> It is your solemn responsibility to determine if the State has proven its accusation beyond a reasonable doubt against Mark Barrow.
> Fla. Standard Jury Instructions 2.1.

The jury was taking its solemn responsibility seriously in this most grave of charges. The trial judge, however, was not. He clearly recognized the actual essence of the jury's question, and also clearly grasped what the jury was really requesting (t. 1243 et seq.), Barrow at 213, 216. The trial judge also clearly knew that he could, without much consideration, although not without any consideration, reject a jury's request for a read back. However, the trial judge further decided, intentionally and over the objection of both the state and the defense, not to even let the jury know that they had the right to ask for testimony to be read back to them (t. 1243 et seq.); Barrow at 216.

Although petitioner agrees that the trial court's statements were correct on the denotation or literal meaning of the jury's request, they were not essentially, substantively,

meaningfully, nor connotationally correct as to the crux or the core of the jury's request. The trial judge's remarks and decision were a form of "gotcha", which should have no place in our system of jurisprudence; and particularly not when coming from the presiding official. The jury was requesting to be made more knowledgeable of the actual testimony in this first degree murder criminal case. A request that the jury made pursuant to its right to do so.

The trial judge, the Fourth District held, abused his discretion by responding to the jury's question about the availability of transcripts in the negative, without advising the jury of the potential for read backs of witnesses' testimony. With this holding, the Fourth District placed its position contrary to the majority decision in Hazuri, Hazuri v. State, 23 So. 3d 857 (Fla. 3rd DCA 2009). Hazuri held that the trial court did not abuse its discretion in advising the jury that it could not be given copies of transcripts and that it had to rely on its own recollection of the testimony, without advising them that portions of the record could be read to them, as the jury did not ask for a "read back". Id at 858. The trial judge's problem in our case with the jury's request appeared also to relate to its timing; i.e. "within the first ten minutes" of commencing their deliberation. Barrow at 216.

The testimony in this trial, however, was sufficiently confused and inconsistent that the jury could well have wished to hear again from the witnesses it requested and the timing of its request was the jury's concern and province: it was not the trial judge's power nor prerogative to undermine the jury's role. Barrow at 213, 219. This was a charge of first degree murder. And regardless of the charge, all juries are charged to deliberate carefully and with full consideration of the gravamen of their weighty responsibility.

The trial judge need not have made a decision as to whether to grant a read back at this point; he merely should have let the jury know that this tool was available to them. And even more so, as both sides had requested that he inform the jury that they could ask for a read back.

The Fourth District looked to Roper, Avila, and the dissenting opinion in Hazuri as support for its decision. Roper v. State, 608 So.2d 533 (Fla. 5th DCA 1992)(finding error in the judge's response of "rely upon collective recollections and remembrance as to what each of the witnesses testified to in order to render your verdict" to the jury question asking to see the victim's cross-examination testimony, which may well have led the jury to conclude that their only recourse was to rely

upon their collective recollections and remembrances as to the cross-examination of the witness); Avila v. State, 781 So. 2d 413 (Fla. 4th DCA 2001)(finding that the trial judge abused his discretion by failing to tell the jury about the potential availability of a read back). Avila further held:

> While the trial court has the discretion to deny a jury's request to read back testimony, it may not mislead the jury into thinking that a readback is prohibited. In this case, the jury clearly sought a readback of specific testimony. The trial court, however, without mentioning that a method of readback was available, informed the jury that there were no transcripts and that the jury members should rely upon their collective recollection. Because such a statement may have confused the jury as to whether a readback of testimony was permissible, we conclude that the trial court abused its discretion.
>
> Id at 415-416.

The Fourth District also cited to Rigdon, Rigdon v. State, 621 So. 2d 475 (Fla. 4th DCA 1993). Rigdon found reversible error in the instruction that any request for a read back would be refused, because the trial judge's comments may reasonably have conveyed to the jurors that to ask for re-reading of testimony would be futile or was prohibited. The Fourth District believed that these cases "are more in harmony with

Florida's view of a jury's role in a criminal trial" than the decision in Hazuri. Barrow at 218.

If we truly want and intend that our jurisprudential system be one in which the:

> jury has a perfect right to return to the court room at any time and ask questions that are calculated to shed light on the controversy or that will in any way assist it or the court in developing the truth of the controversy.
>
> Sutton v. State, 51 So. 2d 725 (Fla. 1951),

then the decision of the Fourth District in this cause should be affirmed, and Hazuri should not stand. If we truly want and intend that our jurisprudential system be one in which our juries make careful and considered deliberations, then the conflict between the districts should be resolved in favor of the decision of the Fourth District. Barrow should be affirmed.

As the Fourth District further held in this cause,

> part of a trial judge's role is to forthrightly make the jury aware of those tools available under the rules of criminal procedure that will assist the jury in arriving at its decision. The judge's role is to facilitate careful deliberation. Deference should be accorded to a jury's request to more closely

> examine the trial testimony. See LaMonte v. State, 145 So.2d 889, 892 (Fla. 2nd DCA 1962).
>
> Barrow at 218.

Many states hold a similar in substance opinion of the role of the trial judge and of his or her responsibilities to the jury. State v. Hebert, 455 A. 2d 925 (Me. 1983)(the justice's practice mandated that jurors guess at, rather than judge, the facts). The court in Hebert further held that "the parties' interests are too substantial, the jurors' task is too important, and the court's inconvenience is too slight in this case to justify a refusal of the reasonable request for rereading of a concise bit of testimony. In the absence of some weighty counterbalancing factor showing a clear danger of substantial and unjustifiable prolongation of the proceeding or of prejudice to a party, we can not approve of any practice that promotes the risk of a jury finding facts without an adequate knowledge of the evidence".

Also see State v. Spaulding, 296 N.W. 2d 870 (Minn. 1980)(trial court abused its discretion by categorically refusing to honor any jury requests for rereading evidence). In Spaulding error was predicated where the trial judge refused to attempt to narrow the jury's request to specific parts of the testimony. The trial court forced the jury to decide the case

on the basis of “sketchy” memory of the evidence. The Spaulding court found the error to be “especially prejudicial” since the requested testimony was the testimony of the defendant, the witness who most clearly presented evidence supporting the claim of self defense. Under these circumstances, the Spaulding court held that even though the defendant failed to object at trial, the trial court committed prejudicial error by refusing the jury’s request in such a close case.

And see People v. Butler, 47 Cal. App. 3d 273 (Cal. 3rd Dist. 1975)(the court reversed the judgment that convicted defendant because of the trial court’s prejudicial error by refusing the jury’s request to reread the testimony of 5 witnesses, which may have altered the outcome of the trial). The Butler court held that the trial judge is not delegated the right to determine the jury’s wishes. The jurors had the right to be apprised of the evidence upon which they were sworn conscientiously to act. Butler further held that the rights of the jury could not be ignored at the whim of the trial judge or for the convenience of the judge and counsel particularly where, as in Butler, the outright refusal of the jury’s request committed the jury to the questionable task of reaching its decisions on the basis of incomplete evidence imperfectly heard.

The Butler court went on to observe that, as in our case, the testimony of the requested witnesses went to the essence of the case. It found the trial judge's refusal to reread testimony to be a miscarriage of justice, holding:

> it is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty.
>
> Id at 284-285.

These cases help to give further flavor and substance in support of the Fourth District decision that it was an abuse of discretion for the trial judge to have willfully refused to make the jury aware of tools available to it that would have assisted the jury in making its decision.

The jury is not taking a test. It need not work alone or without assistance; or be accused of cheating. The jury is entitled to be knowledgeable about what it can and may do in

order to reach an informed, not sketchy, decision based upon all, and not merely some, of the evidence presented.

The decision of the Fourth District Court of Appeal that the trial judge abused his discretion in a manner that was not harmless, was not erroneous. It held that it could not say that the inability of the jury to more closely examine the conflicting evidence did not affect its verdict. It properly concluded that it could not find the error harmless. State v. Powell, 998 So. 2d 531 (Fla. 2008); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The Fourth District's approach is more in harmony with our concept of the role of the jury than is the Third District's opinion in Hazuri.

This conflict decision should be resolved in favor of the Fourth District Court of Appeal. The decision should be affirmed.

ISSUE II

THE FOURTH DISTRICT COURT OF APPEAL DID NOT ERR WHEN IT HELD THAT THE TRIAL JUDGE'S APPARENT ADOPTION OF AN AD HOC RULE PROHIBITING READ BACKS AMOUNTED TO A FAILURE TO EXERCISE THE DISCRETION GRANTED TO TRIAL JUDGES IN THIS AREA

This Court's discretionary jurisdiction grants it the power to resolve decisional conflicts in the body of the law.

Respondent respectfully suggests either that Barrow can be distinguished from Hazuri on this ground standing alone; and/or that this additional deficiency and failure by the trial judge bolsters and strengthens the decision of the Fourth District such that the decision should be upheld, if this Court were otherwise inclined to agree with the Third District. Even if this Court were to find, on the semantic basis, that Hazuri is valid, then the respondent asserts that the decision of the Fourth District should be affirmed, regardless, where the Fourth District further held that the trial judge failed to exercise the discretion granted to him in this area. The Fourth District held that the trial judge in this cause had apparently adopted an ad hoc rule that he prohibited read backs. Barrow at 213. This holding is fully supported by the trial court's statement

at trial made by him when the jury first made their request and the issue arose:

> No, I don't do read backs. Okay.
> (t. 1243).

Such a position by the trial court rises to the threshold of failure to exercise his discretion, pursuant to case law, to the Fla. R. Crim. P. 3.410, and pursuant to the jury instruction that was adopted shortly after this trial took place, and which was in place during the course of this appeal, Instruction 4.4 of Florida Standard Jury Instructions in Criminal Cases.

Both the state and the defense requested that the trial judge advise the jury that they could request a read back of testimony when the jury asked for transcripts of specific witnesses' testimony (t. 1243-1246, Barrow at 213). The trial judge responded to counsels that he didn't do read backs, and merely wrote the jury that there were no transcripts and to rely on their own recollection.

The law is well settled that a trial judge must exercise his discretion where discretion is provided. Refusal to do so is error. Boykin v. Garrison, 658 So. 2d 1090 (Fla. 4th DCA

1995); rev. denied Garrison v. Boykin, 664 So. 2d 248 (Fla. 1995); Steinmann v. State, 839 So. 2d 832 (Fla. 4th DCA 2003). The refusal deprives a party, as it did respondent herein, of a substantial right.

By returning the jury to the jury room to deliberate simply on the basis of what information it did have, the trial court minimized the role of the jury. The judge's response may very well have also minimized, in the minds of the jurors, the significance of the testimony they requested. And he further may have minimized the very concept of careful and well-reasoned deliberation, causing them to surmise - i.e. speculate! - about the very core and crux of the testimony, i.e., the facts, in this first degree murder trial. The trial judge's abuse of and/or failure to exercise his discretion may have led jurors to abandon and/or surrender their independent judgment to the collective group, and/or to those who said they had better memory. This serious error infringed on and vitiated the rights and responsibilities of each and every juror and the jury as a whole. It impaired and harmed respondent's rights. Furthermore, and not to be minimized, in this case, the jury made this request, and both the state and defense requested that the trial court clarify for the jury, and advise them of the potential for a read back.

The conduct of the trial judge in this cause should not be found to have been error free or harmless. His refusal to exercise his discretion prejudiced respondent. Conflict with the Third District should be resolved in favor of the Fourth District and Barrow. As the Fourth District set out therein, citing to Albert v. Miami Transit Co., 154 Fla. 186, 17 So. 2d 89, 90 (Fla. 1944)(citation omitted):

> Judicial discretion is not an unleashed power by which a judge may set at naught the rights of parties to a cause and define them as suits his will or the will of others who may seek to influence his judgment. Judicial discretion is a discretion guarded by the legal and moral conventions that mold the acceptable concept of right and justice. If this is not true, then judicial discretion, like equity, will depend on the length of the judge's foot, the state of his temper, the intensity of his prejudice, or perhaps his zeal to reward or punish a litigant. It takes more than a woolsack and a judicial robe to dehumanize human characteristics that are rehumanized each biennium.

The decision in this case turned on the details. The details were many, and regularly conflicted with each other. The witnesses from the party in appellant's trailer were drunk or high on the night in issue. The State's main witness was not a strong witness. Barrow at 219.

It cannot be said that the trial court's error was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); State v. Powell, 998 So. 2d 531 (Fla. 2008). The decision of the Fourth District was warranted and proper. The Hazuri decision was narrowly focused and overlooked the fact that jurors are not lawyers. They are not versed in lawyer-speak. As Judge Cope said in his dissenting opinion, "if they knew the technical details of the law, then they would have written a better note. But the substance of the question was whether the jury could review the testimony. Defense counsel quite properly said that under rule 3.410, a jury may request to have "testimony read to them", and the court may so order". Hazuri, dissent at 861.

This appeal and/or conflict case should be resolved in favor of the Fourth District Court of Appeal decision.

Barrow should be affirmed. Barrow v. State, 27 So. 3d 211 (Fla. 4th DCA 2010).

ISSUE III

WHETHER THERE WAS INSUFFICIENT PROOF OF CORPUS DELICTI

Respondent respectfully asserts that the trial court and the appellate court erred in finding that corpus delicti was sufficiently proved in this cause. The Fourth District Court of Appeal cited to State v. Lindsey, 738 So. 2d 974 (Fla. 5th DCA 1999) and Davis v. State, 582 So. 2d 695 (Fla. 1st DCA 1991) for its decision that the trial court properly admitted Ms. La Salle's testimony of respondent's confession. Davis holds that the foundational evidence necessary to prove corpus delicti need not eliminate possible noncriminal explanations of a victim's disappearance. Id at 700.

But, respondent suggests, please see, inter alia, Black's Law Dictionary, 5th edition, which begins its definition of corpus delicti with "the body of a crime". It continues its definition with the substance of foundation of a crime; the substantial fact that a crime has been committed.

In this case there was no body. Ms. Tener had a history of disappearing for periods of time, leaving her young son alone. Three major hurricanes had come through,

wreaking havoc and substantial damage. Time had passed since Ms. Tener was last seen, and that may have been in the presence of respondent. There were three drops of Ms. Tener's blood in respondent's van, which could have been deposited on another occasion when she was in the van. It was unrefuted that she had been in the van previously.

Such evidence is insufficient to establish corpus delicti. Burks v. State, 613 So. 2d 441 (Fla. 1993)(Florida courts continue to hold that the corpus delicti of a crime must be established independently of the defendant's confession); J.B. v. State, 705 So. 2d 1376 (Fla. 1998)(an independent corpus delicti must be established when offering an admission into evidence); State v. Walton III, 2010 Fla. App. Lexis 12211, 35 Fla. L. Weekly D1895 (Fla. 2nd DCA 8/20/10)(not final until time expires to file rehearing motion)(the state has the burden to bring forth substantial evidence tending to show commission of the crime charged. This standard does not require the proof to be uncontradicted, or overwhelming, but it must at least show the existence of each element of the crime).

The body of proof in this case simply did not rise to that level. And certainly not to the level of a first degree murder. And please see Marshall v. State, 29 So. 3d

466 (Fla. 4th DCA 2010)(admissions or confessions of a defendant may not be admitted in evidence absent independently established corpus delicti).

Moreover, the evidence of guilt in this case did not satisfy the standard that stringent proof of the corpus delicti of the crime charged - first degree murder - is required to support a conviction. Sciortino v. State, 115 So. 2d 93 (Fla. 2nd DCA 1959). This level of proof simply went unmet.

The judicial quest for truth requires that no person be convicted out of derangement, mistake, or official fabrication. State v. Allen, 335 So. 2d 823 (Fla. 1976). In the circumstances of this case, those odds were just too high.

There has been prejudicial error as a matter of law. On this basis also, respondent, Mark Barrow's conviction should be reversed and he should be forever discharged from further answer to this cause.

CONCLUSION

For the reasons argued hereinabove, separately and cumulatively, the certified conflict should be resolved in favor of the Fourth District opinion in Barrow, Barrow v. State, 27 So. 3d 211 (Fla. 4th DCA 2010) and against the decision in the Third District, Hazuri, Hazuri v. State, 23 So. 3d 857 (Fla. 3rd DCA 2009). The decision in this cause should be affirmed. Respondent should receive a new trial; or, he should be forever discharged from further answer to this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to Daniel P. Hyndman, A.A.G., Office of the Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, Florida 33401-2299 on this 20th day of September 2010.

LEVINE & SUSANECK, P.A.
Attorney Fredrick R. Susaneck
324 Datura Street, Suite 145
West Palm Beach, Fl 33401
Phone (561) 820-8782
Fax (561) 820-8099

Fredrick R. Susaneck, Esquire
Florida Bar Number 332763

LEVINE & SUSANECK, P.A.
Attorney Donna P. Levine
324 Datura St., Ste. 145
W. Palm Beach, Fl 33401
Phone (561) 820-8782
Fax (561) 820-8099

Donna P. Levine, Esquire
Florida Bar No. 539333

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

Fredrick R. Susaneck, Esquire